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EXAMINER

MORGAN, ROBERT W

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/237,194
Filing Date: January 26, 1999
Appellant(s): BROWN, STEPHEN JAMES

Christopher P. Mairoana
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3/31/08 appealing from the Office action mailed 8/10/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,803,625	FU et al.	2-1989
4,838,275	LEE	6-1989

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5,390,238	KIRK et al.	2-1995
5,019,974	BECKERS	5-1991
5,339,821	FUJIMOTO	8-1994

Official Notice

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 34-41, 45-50, 52, 54-59, 61-63, 65, 66, 69-75, 77-84, 88-93, 95, 97-102, 104-106, 108, 109 and 112-118 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,803,625 to Fu et al. and U.S. Patent No. 4,838,275 to Lee in view of U.S. Patent No. 5,390,238 to Kirk et al.

As to Claims 34-41, 45, 49, 50, 54-56, 59, 62, 63, 65, 66, 69-75, Fu discloses a networked health-monitoring system (see Fig. 1), comprising:

a plurality of remote patient sites (see Fig. 1, unit 60), each site including at least one display (i.e. unit 68) (col. 5, lines 53-58);

a data management unit configured to facilitate collection of patient health related data (i.e., event table and CPU 64) (col. 10, lines 1-14 and lines 28-61);

a memory (i.e. unit 80)(see Fig. 2); and

stored program instructions for use in generating health-monitoring related information on the display (i.e. display unit 68 and software of the home unit) (col. 5, lines 56-57, col. 8, line 17 and col. 12, lines 1-24)

at least one central server connectable for communication with the data management unit at the patient sites (see Fig. 1).

Fu does not explicitly disclose

at least one remotely located computer facility including the at least one central server;
and

at least one health care professional computer remotely located from and configured for signal communication with the central server, wherein the central server can generate a report based on the patient health-related data collected at the remote patient site and the report can be viewed at the at least one healthcare professional computer and wherein at least one message can be sent from the healthcare professional computer to the remote patient sites through the central server.

Lee discloses at least one health care professional computer remotely located from and configured for signal communication with the central server to receive at least one report based on the patient health-related data collected at the remote patient sites (i.e. unit 118a) (see Fig. 1, col. 11, lines 54-56 and col. 13, lines 42-47).

It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include at least one health care professional computer remotely located from and configured for signal communication with the central server to receive at least one report based on the patient health-related data collected at the remote patient sites as disclosed by

Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (Lee: col. 5, lines 15-38).

Fu and Lee do not explicitly disclose a remotely located computer facility including the at least one central server, wherein the central server can generate a report based on the patient health-related data collected at the remote patient site and the report can be viewed at the at least one healthcare professional computer and wherein at least one message can be sent from the healthcare professional computer to the remote patient sites through the central server.

Kirk teaches a health support system including a remotely located computer facility including the at least one central server wherein hardware and software of the central server automatically communicates with the data management units and at least one health care professional computer (col. 3, lines 3-11, lines 20-42). In addition, Kirk teaches that the central server can report results of the analysis of patient (32, Fig. 3) status to a doctor (24, Fig. 2), care provider (20, Fig. 2) or local monitoring services (12, Fig. 1) (see: column 5, lines 40-47). Furthermore, Kirk teaches that the health support unit (30, Fig. 3) interacts with the local central server (38, Fig. 3) receive medication and program schedule updates (see: column 5, lines 22-27 and column 3, lines 3-11). The Examiner considers the medication and program schedule updates (messages) to be sent by the doctor or pharmacist computer to the local server and then to the patient.

It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include the aforementioned limitation for the motivation of utilizing a health care

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support system which economically provides medication control, wellness checking and patient data accumulation and reporting capability (Kirk: col. 1, lines 53-60).

As to Claim 46, Fu does not explicitly disclose The system of claim 34, wherein the report is standardized.

However, Lee discloses wherein the report is standardized (col. 17, lines 20-40). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the report is standardized as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to Claim 47, Fu does not explicitly disclose the system of claim 34, wherein the system is configured to allow a health care professional to select which of a plurality of standardized reports is received.

However, Lee discloses wherein the system is configured to allow a health care professional to select which of a plurality of standardized reports is received (col. 13, lines 5-15). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include the system is configured to allow a health care professional to select which of a plurality of standardized reports is received as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to Claim 48, Fu does not explicitly disclose the system of claim 34, wherein the report includes graphs and/or icons.

However, Lee discloses wherein the report includes graphs and/or icons (col. 13, lines 5-16). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the report includes graphs and/or icons as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to Claim 52, Fu does not explicitly disclose the system of claim 34, wherein the report includes displayed formatted statistical information.

However, Lee discloses wherein the report includes displayed formatted statistical information (col. 13, lines 12-17). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the report includes displayed formatted statistical information as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to Claim 57, Fu does not explicitly disclose the system of claim 55, wherein the message includes results of a test.

However, Lee discloses wherein the message includes results of a test (i.e. if there are no untoward signs, this is communicated to the patient)(col. 16, lines 39-43). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the message includes results of a test as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to Claim 58, Fu does not explicitly disclose the system of claim 55, wherein the message includes a diagnostic indication related to whether a test has proceeded in a normal fashion.

However, Lee discloses wherein the message includes a diagnostic indication related to whether a test has proceeded in a normal fashion (i.e. if there are no untoward signs, this is communicated to the patient)(col. 16, lines 39-43). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the message includes a diagnostic indication related to whether a test has proceeded in a normal fashion as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to Claim 61, Fu does not explicitly disclose the system of claim 55, wherein the message is from the health care professional computer.

However, Lee discloses wherein the message is from the health care professional computer (col. 16, lines 40-43).). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the message includes a diagnostic indication related to whether a test has proceeded in a normal fashion as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (col. 5, lines 15-38).

As to claims 77-84, 88-93, 95, 97-102, 104-106, 108, 109 and 112-118, the claims are similar in scope to claims 34-41, 45-50, 52, 54-59, 61-63, 65, 66, 69-75 and are rejected on the same basis.

5. Claim 42, 44, 85 and 87 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fu, Lee, and Kirk as applied to claims 34 and 77 above, and further in view of Beckers, Pat. No. 5,019,974.

As to Claim 42, Fu and Lee do not explicitly disclose the system of claim 41, wherein the handheld device is capable of displaying pictorial health-monitoring related information.

However, Beckers discloses wherein the handheld device is capable of displaying pictorial health-monitoring related information (see Fig. 2). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the handheld device is capable of displaying pictorial health-monitoring related information as disclosed by Beckers within Fu, Lee, and Kirk for the motivation of providing a patient with an individually tailored program of treatment (col. 1, lines 7-14)

As to Claim 44, Fu and Lee do not explicitly disclose The system of claim 42, wherein the handheld device is capable of displaying animated health-monitoring related information.

However, Beckers discloses wherein the handheld device is capable of displaying animated health-monitoring related information (see Fig. 2). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the handheld device is capable of displaying animated health-monitoring related information as disclosed by Beckers within Fu, Lee and Kirk for the motivation of providing a patient with an individually tailored program of treatment (col. 1, lines 7-14).

As to claims 85 and 87, the claims are similar in scope to claims 42 and 44 and are rejected on the same basis.

6. Claims 51, 53, 60, 64, 67 94, 96, 103, 107, 110, and 111 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fu, Lee, and Kirk as applied to claims 34 and 77 above, and further in view of Fujimoto, Pat. No. 5,339,821.

As to Claims 51, 53, 60, 64, 67, and 68, Fu, Lee, and Kirk do not explicitly disclose The system of claim 34, wherein the system is configured to cause the presentation of at least one report on the display at a remote patient site.

However, Fujimoto discloses wherein the system is configured to cause the presentation of at least one report on the display at a remote patient (col. 4, lines 48-56). It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the system is configured to cause the presentation of at least one report on the display at a remote patient site as disclosed by Fujimoto within Fu and Lee for the motivation of providing a medical system and apparatus which permits patients to check or measure the condition of a disease at home (col. 1, line 66 – col. 2, line 5).

As to claims 94, 96, 103, 107, 110, and 111, the claims are similar in scope to claims 51, 53, 60, 67, and 68 and are rejected on the same basis.

7. Claims 43 and 86 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fu, Lee, and Kirk as applied to claims 34 and 77 above, and further in view of Examiner's use of Official Notice.

As to Claim 43, Fu, Lee, and Kirk do not explicitly disclose the system of claim 40, wherein the memory is a program cartridge.

However, the Examiner takes official notice that it was well known in the computer arts to use program cartridges to program handheld devices. The motivation was to provide a simple and inexpensive means for providing computer programs that are popular or in demand by a number of users. . It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the memory is a program cartridge for the motivation stated above.

As to claims 86, the claim is similar in scope to claim 43 and is rejected on the same basis.

8. Claims 76 and 119-138 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fu, Lee and Kirk as applied to claims 40 above, and further in view of Examiner's use of Official Notice.

As to Claim 76, Fu, Lee, and Kirk do not explicitly disclose the system of claim 34, wherein the healthcare professional computer receives the report after transmitting an authorization code to the server that identifies an associated healthcare professional as an authorized user.

However, the Examiner takes official notice that it was well known in the computer arts to use personal identification numbers (pin) to authorize users to access systems, programs and stored data on computers. The motivation for using pin numbers was to grant access to data or the computer system to authorized users only, particularly sensitive data or information such as patient medical data. It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the healthcare professional computer receives the report after transmitting an authorization code to the server that identifies an associated

healthcare professional as an authorized user within Fu, Lee and Kirk for the motivation stated above.

As per claim 119, Fu discloses a networked health-monitoring system (see Fig. 1), comprising:

a plurality of remote patient sites (see Fig. 1, unit 60),

using stored program instructions to generate health-monitoring related information on at least one display (i.e. unit 68)(col. 5, lines 53-58);

facilitating collection of patient health-related data using a data management unit (i.e.. event table and CPU 64)(col. 10, lines 1-14 and lines 28-61); and

stored program instructions for use in generating health-monitoring related information on the display (i.e. display unit 68 and software of the home unit) (col. 5, lines 56-57, col. 8, line 17 and col. 12, lines 1-24);

at least one central server connectable for communication with the data management unit at the patient sites (see Fig. 1).

Fu does not explicitly disclose

at least one remotely located computer facility including the at least one central server; and

providing at least one report to at least one health care professional computer, remotely located from and in signal communication with the central server, the report being based on the patient health-related data collected at the remote patient sites,

wherein hardware and software of the central server allows at least one message sent from the health care professional computer to be sent remote patient site, and

receiving the report after transmitting an authorization code to the server that identifies an associated healthcare professional as an authorized user.

Lee discloses at least one health care professional computer remotely located from and configured for signal communication with the central server to receive at least one report based on the patient health-related data collected at the remote patient sites (i.e. unit 118a) (see Fig. 1, col. 11, lines 54-56 and col. 13, lines 42-47).

It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include at least one health care professional computer remotely located from and configured for signal communication with the central server to receive at least one report based on the patient health-related data collected at the remote patient sites as disclosed by Lee within Fu for the motivation of providing detailed home medical surveillance of patients with a minimal amount of trained technical personnel and minimal training and participation by the patient (Lee: col. 5, lines 15-38).

Fu and Lee do not explicitly disclose a remotely located computer facility including the at least one central server, wherein the central server can generate a report based on the patient health-related data collected at the remote patient site and the report can be viewed at the at least one healthcare professional computer and wherein at least one message can be sent from the healthcare professional computer to the remote patient sites through the central server.

Kirk teaches a health support system including a remotely located computer facility including the at least one central server wherein hardware and software of the central server automatically communicates with the data management units and at least one health care professional computer (col. 3, lines 3-11, lines 20-42). In addition, Kirk teaches that the central

server can report results of the analysis of patient (32, Fig. 3) status to a doctor (24, Fig. 2), care provider (20, Fig. 2) or local monitoring services (12, Fig. 1) (see: column 5, lines 40-47).

Furthermore, Kirk teaches that the health support unit (30, Fig. 3) interacts with the local central server (38, Fig. 3) receive medication and program schedule updates (see: column 5, lines 22-27 and column 3, lines 3-11). The Examiner considers the medication and program schedule updates (messages) to be sent by the doctor or pharmacist computer to the local server and then to the patient.

It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include the aforementioned limitation for the motivation of utilizing a health care support system which economically provides medication control, wellness checking and patient data accumulation and reporting capability (col. 1, lines 53-60).

Fu, Lee, and Kirk do not explicitly disclose the system of claim 34, wherein the healthcare professional computer receives the report after transmitting an authorization code to the server that identifies an associated healthcare professional as an authorized user.

However, the Examiner takes official notice that it was well known in the computer arts to use personal identification numbers (pin) to authorize users to access systems, programs and stored data on computers. The motivation for using pin numbers was to grant access to data or the computer system to authorized users only, particularly sensitive data or information such as patient medical data. It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to include wherein the healthcare professional computer receives the report after transmitting an authorization code to the server that identifies an associated

healthcare professional as an authorized user within Fu, Lee and Kirk for the motivation stated above.

As to claims 120-124, the claims are similar in scope to claim 119 and are rejected on the same basis.

As to claims 125-131, the claims are similar in scope to claims 57 and 72 and are rejected on the same basis.

As to claims 132-138, the claims are similar in scope to claims 119-124 and are rejected on the same basis.

(10) Response to Argument

In the Appeal Brief filed 31 March 2008, Appellant makes the following arguments:

(A) Appellant directs the Examiner to a Declaration filed under 37 C.F.R. § 1.131 along with evidence demonstrating Applicant had the concept of the subject invention prior to the effective filing date of the Kirk et al. (June 15, 1992) and was diligent from a date prior to the filing date until the date that Applicant filed the subject patent application.

Examiner will address Appellant's arguments in sequence as they appear in the brief.

Response to Argument (A):

In response to the first argument, the Examiner respectfully submits that the documents submitted by the Applicant indicate that conception of the invention took prior to June 15, 1992. However, Applicant has failed to provide specific evidence that he worked diligently from prior to June 15, 1992 until an actual reduction to practice date, or that he worked diligently prior to June 15, 1992 (constructive reduction to practice for the Kirk et al. references) until November 17, 1992.

MPEP § 2138.06 states the following:

An applicant must account for the entire period during which diligence is required. *Gould v. Schawlow*, 363 F.2d 908, 919, 150 USPQ 634, 643 (CCPA 1966) (Merely stating that there were no weeks or months that the invention was not worked on is not enough.); *In re Harry*, 333 F.2d 920, 923, 142 USPQ 164, 166 (CCPA 1964)(statement that the subject matter "was diligently reduced to practice" is not a showing but a mere pleading). (Diligence requires that applicants must be specific as to dates and facts.)

The period during which diligence is required must be accounted for by either affirmative acts or acceptable excuses. *Rebstock v. Flouret*, 191 USPQ 342, 345 (Bd. Pat. Inter. 1975); *Rieser v. Williams*, 225 F.2d 419, 423, 118 USPQ 96, 100 (CCPA 1958) (Being last to reduce to practice, party cannot prevail unless he has shown that he was first to conceive and that he exercised reasonable diligence during the critical period from just prior to opponent's entry into the field); *Griffith v. Kanamaru*, 816 F.2d 624, 2 USPQ2d 1361 (Fed. Cir. 1987) (Court generally reviewed cases on excuses for inactivity including vacation extended by ill health and daily job demands, and held lack of university funding and personnel are not acceptable excuses.); *Litchfield v. Eigen*, 535 F.2d 72, 190 USPQ 113 (CCPA 1976).

The work relied upon to show reasonable diligence must be directly related to the reduction to practice of the invention in issue. *Naber v. Cricchi*, 567 F.2d 382, 384, 196 USPQ 294, 296 (CCPA 1977), *cert. denied*, 439 U.S. 826 (1978). >See also *Scott v. Koyama*, 281 F.3d 1243, 1248-49, 61 USPQ2d 1856, 1859 (Fed. Cir. 2002).

The declaration includes Exhibits A through AB that relate to financing the development of the product (Exhibit C) and an ideal platform for a home system which connects to the doctor system via modem (Exhibit B), dated from just prior to Kirk et al. (June 15, 1992) until an actual reduction to practice date of November 17, 1992, these Exhibits merely contemplate or consider an ideal platform which includes a three part system such as a data management unit, at least one remotely located computing facility and at least one central server all communicating together and the MPEP states "The work relied upon to show reasonable diligence must be directly related to the reduction to practice of the invention in issue" *Naber v. Cricchi*, 567 F.2d 382, 384, 196 USPQ 294, 296 (CCPA 1977), *cert. denied*, 439 U.S. 826 (1978). Furthermore, the Exhibits describe only a patient interface system but have no integration of the overall system including a physician interface until Exhibit T dated August 13, 1992. In addition, the Exhibits have at least 2 days of inactivity and the Applicant has not providing an acceptable excuse in order to account for time lapse between these lapses and MPEP states "The period during which diligence is required must be accounted for by either affirmative acts or acceptable excuses" *Rebstock v.*

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Flouret, 191 USPQ 342, 345 (Bd. Pat. Inter. 1975). As such, it is submitted that the Applicant has failed to provide evidence with respect to works directly related to the reduction to practice of the invention and providing an acceptable excuse for the time lapse between months showing reasonable due diligence.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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